

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
3 BEFORE THE HONORABLE JOHN E. MUNTER, JUDGE
4 DEPARTMENT NO. 505

5
6 LESLIE J. WHITELEY AND)
7 LEONARD WHITELEY,)
8 PLAINTIFFS,)
9 VS.) NO. 303184
10 RAYBESTOS-MANHATTAN, INC., ET)
11 AL.,)
12 DEFENDANTS.)
13 _____)
14

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS
16 MONDAY, FEBRUARY 14, 2000
17 (VOLUME 23, PAGES 3122-3153)
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23 REPORTED BY: JUDITH ANN OSSA, CSR 2310
24 OFFICIAL REPORTER
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JUDITH ANN OSSA, CSR NO. 2310
3123

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JUDITH ANN OSSA, CSR NO. 2310

3124

WITNESS NAME	PAGE
VIDEOTAPE SHOWING OF THE DEPOSITION TESTIMONY OF LESLIE WHITELEY.....	3151
PLAINTIFFS' EXHIBITS	
EXHIBIT	PAGE
PLAINTIFFS' EXHIBIT 1928 MARKED FOR IDENTIFICATION.....	3150
PLAINTIFFS' EXHIBIT 1928-A MARKED FOR IDENTIFICATION.....	3150
PLAINTIFFS' EXHIBIT 1929 MARKED FOR IDENTIFICATION.....	3151

10
11
12
13
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15
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17
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JUDITH ANN OSSA, CSR NO. 2310

3125

MONDAY, FEBRUARY 14, 2000 9:20 A.M.
(THE FOLLOWING PROCEEDINGS WERE HELD IN THE
COURTROOM, IN THE PRESENCE OF THE JURY)
THE COURT: GOOD MORNING. YOU WILL SEE THAT
SEAT NO. 9 IS EMPTY. MR. SHIPMAN IS NOT HERE. AND MR.
SHIPMAN RAN ACROSS AN UNFORESEEABLE PROBLEM.
I HAVE JUST SPOKEN TO HIM, AND I TOLD HIM THAT WE
NEED HIM TO STICK WITH US. I JUST CAN'T AFFORD TO LOSE ANY
MORE JURORS.
SO I'VE ASKED HIM TO COME BACK AT 1:30 THIS
AFTERNOON. I TOLD HIM I WOULD GIVE YOU THE MORNING OFF, BUT
I NEEDED HIM BACK AT 1:30. THESE ARE CIRCUMSTANCES BEYOND
HIS CONTROL, AND THERE'S NO FAULT BEING ATTRIBUTED TO HIM,
BUT I JUST CAN'T AFFORD TO LOSE ANY MORE JURORS.
SO I'M GOING TO HAVE TO GIVE YOU THE MORNING OFF
AND HAVE YOU COME BACK AT 1:30 TODAY. I DON'T WANT TO LOSE
THE OTHER HALF OF THE DAY EITHER. SO THAT'S UNFORTUNATE.

18 THESE THINGS HAPPEN. AND I HOPE YOU'LL BE PATIENT AND
19 UNDERSTANDING.

20 THIS IS NOT A MATTER OF ANYBODY'S FAULT. I'M
21 TRYING TO BALANCE HIS PROBLEM AGAINST YOUR INCONVENIENCE,
22 AND THE BEST WAY THAT I CAN DO IT IS TO GIVE YOU A HALF A
23 DAY OFF AND, AS I SAY, HAVE YOU COME BACK AT 1:30.

24 I GOT A COUPLE OF OTHER NOTES FROM YOU, WHICH
25 I'LL ADDRESS ALSO. ONE OF YOU, MR. MOONEY, YOU HAD A
26 QUESTION. TATSUO WILL TALK TO YOU ABOUT YOUR QUESTION WHEN
27 WE RECESS IN A MINUTE.

28 I ALSO HAVE A QUESTION ABOUT IF ANY OF YOU NEED
JUDITH ANN OSSA, CSR NO. 2310

3126 1 TO HAVE A RESTROOM BREAK, CAN YOU DO THAT BY RAISING YOUR
2 HAND? AND THE ANSWER IS YES. I THINK I HAD MENTIONED THAT
3 AT THE START OF THE CASE. IF AT ANY TIME ANY OF YOU WANTS
4 TO TAKE A BREAK, RAISE YOUR HAND. WE'LL OBVIOUSLY
5 ACCOMMODATE THAT.

6 THE LAST QUESTION THAT I HAD WAS: WHAT IS THE
7 DATE THAT WE ESTIMATE THE END OF THE TRIAL BEFORE
8 DELIBERATIONS START?

9 WHAT I WANT TO SAY ABOUT THAT RIGHT NOW IS THAT
10 WE'RE STILL ON THE SCHEDULE THAT I GAVE YOU. THE LAWYERS,
11 AS I'VE INDICATED TO YOU, ARE GOING TO MAKE UP FOR ANY TIME
12 WE LOSE, SUCH AS THE TIME THIS MORNING. THEY'RE GOING TO
13 COOPERATE AND MAKE IT SO AS NOT TO EXTEND THE FULL AMOUNT OF
14 TIME FOR YOU.

15 BEFORE BEING MORE SPECIFIC ABOUT IT, THOUGH, WHAT
16 I'D LIKE TO DO IS WAIT UNTIL THE END OF THIS WEEK AND DO
17 THAT, BECAUSE THE DEFENSE IS GOING TO START PRESENTING THEIR
18 CASE, PROBABLY NOW TOMORROW MORNING.

19 I WANT TO GET A FEW DAYS INTO THAT, AND THEN I'LL
20 BE ABLE TO, I THINK, GIVE YOU A MUCH MORE REALISTIC
21 PREDICTION. I DON'T THINK IT WOULD BE PROFITABLE FOR ME TO
22 TRY TO GIVE YOU AN EXACT DATE RIGHT NOW, EXCEPT TO TELL YOU
23 THAT WE'RE STILL ON SCHEDULE. BUT I WILL MAKE EVERY EFFORT
24 BY THE END OF THIS WEEK TO BE MORE SPECIFIC WITH YOU ON THAT
25 SUBJECT.

26 SO THE BOTTOM LINE IS I HOPE THAT YOU CAN FIND
27 SOMETHING TO DO IN THE NEIGHBORHOOD OR AT LEAST SOMETHING TO
28 DO SO THAT YOU CAN BE BACK AT 1:30.

JUDITH ANN OSSA, CSR NO. 2310

3127 1 I WOULD LIKE TO HAVE YOU ALL BACK PROMPTLY AT
2 1:30, BECAUSE I WOULD AT LEAST LIKE TO GET IN A HALF DAY
3 TODAY. I WANT TO THANK YOU IN ADVANCE FOR YOUR
4 COOPERATION. I KNOW THIS IS AN INCONVENIENCE.

5 SO PLEASE CONTINUE TO FOLLOW THE ADMONITION.
6 HAVE A GOOD MORNING, AND WE'LL SEE YOU AT 1:30.

7 (THE JURY WAS DISMISSED AT 9:22 A.M., TO
8 RETURN AT 1:30 P.M.)

9 (THE FOLLOWING PROCEEDINGS WERE HELD IN
10 CHAMBERS, OUTSIDE THE PRESENCE OF THE JURY,
11 AT 12:25 P.M.)

12 THE COURT: WE ARE ON THE RECORD OUTSIDE THE
13 PRESENCE OF THE JURY FOR PURPOSES OF DEALING WITH VARIOUS
14 MATTERS.

15 FIRST, THE COURT IS PREPARED TO RULE ON VARIOUS
16 OF THE IN LIMINE MOTIONS. LET ME BE SURE THAT ALL OF THEM
17 ARE SUBMITTED. THE COURT HAS RECEIVED PAPERS ON THEM ALL
18 AND HAS ACTUALLY HEARD ARGUMENT ON THEM ALL, BUT I THINK IT
19 WAS LARGEMLY, IF NOT ENTIRELY, OFF THE RECORD IN TERMS OF THE
20 ARGUMENTS.

21 SO REALLY, THE QUESTION IS: ARE YOU PREPARED TO
22 SUBMIT ON THE RECORD AS IT STANDS? AND THE THREE MOTIONS
23 ARE: "DEFENDANT PHILIP MORRIS INCORPORATED'S MOTION IN
24 LIMINE TO EXCLUDE ANY EVIDENCE OF OR REFERENCE TO 'DEATH IN
25 THE WEST,' WHICH IS THEIR MOTION NO. 8.

26 IS THAT SUBMITTED?

27 MS. CHABER: SUBMITTED.

28 MR. HARDY: YES, SUBMITTED.

JUDITH ANN OSSA, CSR NO. 2310

3128 1 THE COURT: AND THE "TOBACCO DEFENDANTS' MOTION
2 IN LIMINE TO EXCLUDE ANY EVIDENCE OF OR REFERENCE TO TOBACCO
3 INDUSTRY ADVOCACY EFFORTS, GOVERNMENT PETITIONING ACTIVITIES
4 OR TESTIMONY AT HEARINGS BEFORE ANY COMMITTEE OR
5 SUBCOMMITTEE OF ANY GOVERNMENT AGENCY OR LEGISLATIVE BODY."

6 AND ACTUALLY, THE FACET ON THAT ON WHICH I
7 PROPOSE TO RULE IS THE TESTIMONY GIVEN IN 1994 BEFORE
8 CONGRESS, BECAUSE THAT'S BEEN THE ONLY MATTER THAT'S BEEN
9 PRESSED ON THE COURT. AND THAT WAS DEFENDANTS' IN LIMINE
10 NO. 16.

11 IS THAT MATTER SUBMITTED?

12 MR. ESCHER: YES, YOUR HONOR.

13 MR. HARDY: YES.

14 MS. CHABER: THAT WASN'T THE ONLY THING BEFORE
15 THE COURT, THAT SPECIFIC TESTIMONY, BECAUSE THERE HAVE BEEN
16 DOCUMENTS THAT HAVE COME UP ALL ALONG THE WAY, YOUR HONOR,
17 THAT WE BELIEVE RELATE TO SIMILAR ISSUES, ADVOCACY EFFORTS,
18 ETCETERA.

19 THE COURT: I THINK WE MAY HAVE PUT THOSE ON THE
20 RECORD. IF WE DIDN'T, WE NEED TO PUT THEM ON THE RECORD IN
21 THE CONTEXT OF THE SPECIFIC DOCUMENTS. WHAT I WAS GOING TO
22 RULE ON RIGHT NOW WAS THE 1994 CONGRESSIONAL TESTIMONY, WITH
23 THE UNDERSTANDING THAT COUNSEL SHOULD FEEL FREE TO PUT ON
24 THE RECORD ANY REFERENCES TO DOCUMENTS THAT IMPLICATE THE
25 SAME KINDS OF CONSIDERATIONS, BUT I THINK IT'S TOO ABSTRACT
26 TO DEAL WITH THE DOCUMENTS WITHOUT SPECIFIC REFERENCE TO
27 THEM.

28 ANYWAY, IS THIS MATTER SUBMITTED ON THE 1994

JUDITH ANN OSSA, CSR NO. 2310

3129 1 HEARINGS?

2 MR. HARDY: YES, YOUR HONOR.

3 MR. FURR: YES.

4 MS. CHABER: YES.

5 THE COURT: AND FINALLY, METALCLAD INSULATION
6 CORPORATION HAS MADE A MOTION IN LIMINE "TO EXCLUDE
7 VIDEOTAPE OFFERED BY PLAINTIFFS' EXPERT RICHARD HATFIELD."
8 AND THE COURT DID VIEW THAT VIDEO IN COUNSEL'S PRESENCE.

9 IS THAT MATTER SUBMITTED AS WELL?

10 MR. ROSSE: THAT WAS ALSO A MOTION TO EXCLUDE
11 RELEVANT TESTIMONY REGARDING THE EXPERIMENT DEPICTED IN THE
12 VIDEO AS WELL.

13 THE COURT: I WAS READING FROM THE TITLE OF IT,
14 BUT THAT'S CORRECT.

15 IS THAT SUBMITTED?

16 MR. ROSSE: YES, IT IS.

17 MS. CHABER: SUBMITTED.

18 THE COURT: ALL RIGHT. HERE ARE THE RULINGS:
19 FIRST OF ALL, ON DEFENDANTS' NO. 8, WHICH REFERS
20 TO THE FILM "DEATH IN THE WEST," THE MOTION RELATES TO
21 INFORMATION APPEARING IN A BRITISH TV FILM ENTITLED "THIS
22 WEEK -- THE MARLBORO STORY -- DEATH IN THE WEST."

23 THE COURT GRANTS PHILIP MORRIS' MOTION TO EXCLUDE

24 ANY REFERENCE TO INFORMATION APPEARING IN THE FILM "DEATH IN
25 THE WEST." THE MOTION IS GRANTED ON THE FOLLOWING
26 INDEPENDENTLY SUFFICIENT GROUNDS:

27 THE FIRST INDEPENDENTLY SUFFICIENT GROUND IS
28 FOUND IN THE DOCTRINE OF COMITY BETWEEN COURTS. IN A
JUDITH ANN OSSA, CSR NO. 2310

3130 1 LAWSUIT BROUGHT IN GREAT BRITAIN BY PHILIP MORRIS AGAINST
2 THE FILM'S PRODUCER, THE BRITISH COURT, FOLLOWING A TRIAL,
3 HELD IN SUBSTANCE THAT THE FILM WAS CREATED THROUGH THE
4 PERPETUATION OF A FRAUD UPON PHILIP MORRIS.

5 PRIOR TO THE TRIAL, THE FILM HAD BEEN SHOWN ONLY
6 ONE TIME AND THAT WAS ON BRITISH TV. THE BRITISH COURT
7 ISSUED A PERMANENT INJUNCTION PROHIBITING THE PRODUCTION
8 COMPANY FROM FURTHER SHOWING OR ALLOWING ANYONE TO SHOW

THE 9 FILM, AND FURTHER ORDERED THE PRODUCTION COMPANY TO RETURN
10 ALL RECORDED MATERIAL.

11 UNDER THESE CIRCUMSTANCES, THIS COURT APPLIES THE
12 DOCTRINE OF COMITY BETWEEN THE COURTS TO BAR USE OF THE FILM
13 OR ANY OF ITS CONTENTS IN THIS CASE. TO DO OTHERWISE WOULD
14 BE TO PERMIT FRUSTRATION ON THE BRITISH COURT'S INJUNCTION.

15 THE SECOND INDEPENDENTLY SUFFICIENT GROUND IS
16 FOUND IN SECTION 352 OF THE EVIDENCE CODE. THE PROFFERED
17 EVIDENCE IS RELEVANT IN THIS CASE, BUT ITS PROBATIVE VALUE
18 IS REDUCED BY THE FACT THAT THE FILM WAS NEVER BROADCAST IN
19 THE UNITED STATES AND THEREFORE IS UNLIKELY TO HAVE
20 INFLUENCED ANY SOCIETAL OR INDIVIDUAL VIEWS IN THIS COUNTRY
21 ON THE SUBJECT OF SMOKING AND HEALTH.

22 FURTHER, THERE IS NO EVIDENCE THAT PLAINTIFF
23 LESLIE WHITELEY KNEW OF OR IN ANY WAY RELIED UPON THIS FILM
24 OR ITS CONTENT. THE PROBATIVE VALUE IS ALSO LESSENED BY
25 VIRTUE OF OTHER SIMILAR EVIDENCE WHICH PLAINTIFF HAS
AVAILABLE TO IT IN THIS CASE.

27 ON THE OTHER SIDE OF THE COIN IS THE OBVIOUS
28 UNDUE PREJUDICE WHICH WOULD BE IMPOSED UPON PHILIP MORRIS
JUDITH ANN OSSA, CSR NO. 2310

3131 1 FROM ALLOWING IT TO BE DISADVANTAGED BY REASON OF THE FRAUD
2 APPARENTLY PERPETUATED UPON IT IN GREAT BRITAIN, AS HELD BY
3 THE BRITISH COURT FOLLOWING A FULL TRIAL. FURTHER UNDUE
4 PREJUDICE IS FOUND IN THE UNFAIR EDITING OF THE INTERVIEWS
5 AND THE FILM DONE BY THOSE WHO PRODUCED THE FILM.

6 THIS COURT FINDS THAT UNDER SECTION 352 OF THE
7 EVIDENCE CODE, THE PROBATIVE VALUE OF THE PROFFERED EVIDENCE
8 IS SUBSTANTIALLY OUTWEIGHED BY THE PROBABILITY THAT ITS
9 ADMISSION WILL CREATE SUBSTANTIAL DANGER OF UNDUE PREJUDICE
10 TO PHILIP MORRIS. THIS COURT WOULD REACH THE SAME RESULT
11 UNDER SECTION 352 EVEN ABSENT ANY UNFAIRNESS IN THE PROCESS
12 OF EDITING THE INTERVIEWS AND THE FILM.

13 TURNING NEXT TO THE TOBACCO DEFENDANTS' MOTION
14 NO. 16 TO EXCLUDE REFERENCE TO TESTIMONY GIVEN IN 1994 BY
15 THE TOP EXECUTIVES OF THE TOBACCO COMPANIES. AND THE COURT
16 HAS IN MIND THAT THE MOTION IS BROADER THAN THAT, BUT THIS
17 RULING IS APPLYING TO THAT TESTIMONY AT THIS POINT, BECAUSE
18 INSOFAR AS FURTHER RULING IS NEEDED, AS I UNDERSTAND IT FROM
19 MS. CHABER, IT IS IN THE CONTEXT OF SPECIFIC DOCUMENTS, AND
20 THE COURT WOULD PREFER TO MAKE ITS RULING IN THE CONTEXT OF
21 THOSE DOCUMENTS. SO IT'S THE BURDEN OF PLAINTIFFS' COUNSEL
22 TO PRESENT ON THE RECORD A REFERENCE TO THE DOCUMENTS THAT
23 WE ARE TALKING ABOUT HERE.

24 THIS RULING RIGHT NOW RELATES TO THE TESTIMONY
25 GIVEN IN 1994 BY THE TOP EXECUTIVES OF THE TOBACCO COMPANIES

26 TO A CONGRESSIONAL SUBCOMMITTEE WHICH WAS CONSIDERING THE
27 MATTER OF IMPOSING FDA REGULATION ON THE TOBACCO INDUSTRY.
28 THE TESTIMONY WAS TO THE EFFECT THAT THE INFORMATION
JUDITH ANN OSSA, CSR NO. 2310

3132 1 AVAILABLE TO THE TOBACCO COMPANIES DOES NOT ESTABLISH IN
2 THEIR MINDS THAT CIGARETTES ARE ADDICTIVE.

3 CIVIL CODE SECTION 47(B) PROVIDES IN SUBSTANCE,
4 AND IN RELEVANT PART, THAT A CAUSE OF ACTION MAY NOT BE
5 PREDICATED UPON TESTIMONY GIVEN IN A LEGISLATIVE
6 PROCEEDING. INDEED, PLAINTIFFS IN THIS CASE CONCEDE THAT
7 THEY MAY NOT BASE A CAUSE OF ACTION UPON TESTIMONY BEFORE
8 CONGRESS. THAT CONCESSION IS FOUND AT PAGE 8 OF PLAINTIFFS'
9 BRIEF ON THIS SUBJECT.

10 HOWEVER, WHILE MAKING THAT CONCESSION, PLAINTIFFS
11 ARGUE THAT THEY OFFER THIS EVIDENCE MERELY AS EVIDENCE OF A
12 PATTERN OF DECEPTIVE AND MANIPULATIVE CONDUCT AND NOT AS THE
13 BASIS OF LIABILITY.

14 IN THIS COURT'S VIEW, THE ESSENTIAL RELEVANCE OF
15 THE PROFFERED EVIDENCE IS TO FIX LIABILITY UPON THE TOBACCO
16 DEFENDANTS FOR FRAUD IN THE SUBSTANCE OF THE TESTIMONY
17 ITSELF. AND EVEN IF THAT WERE NOT THE ESSENTIAL RELEVANCE
18 OF THE EVIDENCE, THERE EXISTS THE STRONG POSSIBILITY, IF NOT
19 THE LIKELIHOOD, THAT THE JURY WOULD EVALUATE THE EVIDENCE IN
20 THAT CONTEXT. THUS, THERE IS SIGNIFICANT LIKELIHOOD THAT
21 THE JURY WOULD CONSIDER THE EVIDENCE FOR A PROHIBITED
22 PURPOSE.

23 ON THE OTHER SIDE OF THE BALANCE, THE COURT
24 CONCLUDES THAT THE RELEVANCE OF THE EVIDENCE FOR
25 NONPROHIBITED PURPOSES IS NOT STRONG. IN THIS CONNECTION,
26 PLAINTIFF SMOKED CIGARETTES FOR 22 YEARS BEFORE THE 1994
27 HEARINGS, SHOWING THAT THE HEARINGS HAD NOTHING TO DO WITH
28 PLAINTIFF'S LONG-STANDING SMOKING HISTORY.

JUDITH ANN OSSA, CSR NO. 2310

3133 1 FURTHERMORE, PLAINTIFF TESTIFIED AT DEPOSITION
2 THAT HER SECONDHAND INFORMATION ABOUT THE HEARINGS DID NOT
3 CAUSE HER TO CHANGE HER BELIEFS ABOUT THE ADDICTIVENESS OF
4 NICOTINE.

5 ALSO, IT IS NOTEWORTHY THAT PLAINTIFFS' NEED FOR
6 THIS PARTICULAR EVIDENCE IS REDUCED BY THE FACT THAT
7 PLAINTIFFS HAVE PRESENTED OTHER EVIDENCE OF SIMILAR IMPORT.
8 THUS, PLAINTIFFS THEMSELVES HAVE CHARACTERIZED THE
9 CONGRESSIONAL TESTIMONY AS "BUT A SMALL PART OF THE EVIDENCE
10 PLAINTIFFS MAY INTRODUCE AT TRIAL." THIS QUOTATION COMES
11 FROM PAGE 2 OF PLAINTIFFS' BRIEF ON THIS SUBJECT.

12 AGAINST THIS BACKGROUND, THE COURT FINDS THAT THE
13 PROBATIVE VALUE OF THE PROFFERED EVIDENCE IS SUBSTANTIALLY
14 OUTWEIGHED BY THE PROBABILITY THAT ITS ADMISSION WILL CREATE
15 SUBSTANTIAL DANGER OF UNDUE PREJUDICE, OF CONFUSING THE
16 ISSUES AND OF MISLEADING THE JURY. ACCORDINGLY, OBJECTION
17 TO THE EVIDENCE IS SUSTAINED UNDER EVIDENCE CODE SECTION
18 352, AS WELL AS UNDER THE DOCTRINE OF COMITY OF COURTS.

19 FINALLY --

20 MS. CHABER: COMITY?

21 THE COURT: COMITY.

22 MS. CHABER: YES. HOW DID THAT COME IN ON THIS
23 ONE?

24 THE COURT: EXCUSE ME. EXCUSE ME. STRIKE THE
25 REFERENCE TO COMITY. THAT WAS A REFERENCE BACK TO THE OTHER
26 MOTION. THIS MOTION IS SUSTAINED ON GROUNDS OF 352 ALONE.
27 THAT WAS A MISTAKE.

28 NOW, WITH RESPECT TO METALCLAD INSULATION'S

3134

1 MOTION TO EXCLUDE THE VIDEOTAPE OR INFORMATION ABOUT THE
2 VIDEOTAPE, THE COURT, HAVING VIEWED THAT VIDEOTAPE, FINDS
3 THAT IT IS IRRELEVANT, AND EVEN IF IT HAD ANY RELEVANCE, THE
4 COURT WOULD EXCLUDE IT UNDER EVIDENCE CODE SECTION 352 IN
5 THAT THE PROBATIVE VALUE, IF ANY, WOULD BE SUBSTANTIALLY
6 OUTWEIGHED BY THE PROBABILITY THAT THE ADMISSION OF THE
7 VIDEOTAPE AND THE INFORMATION ABOUT IT WOULD NECESSITATE
8 UNDUE CONSUMPTION OF TIME, ALSO CREATE A SUBSTANTIAL DANGER
9 OF UNDUE PREJUDICE, ALSO CONFUSE THE ISSUES AND ALSO MISLEAD
10 THE JURY.

11 THE COURT MAKES THE FOLLOWING OBSERVATIONS:

12 THERE WAS NO EVIDENCE IN THIS CASE THAT THE CLOTHING IN THE
13 VIDEO IS SIMILAR TO THAT WORN BY PLAINTIFF'S FATHER. ALSO,
14 THERE IS NO EVIDENCE THAT PLAINTIFF'S FATHER'S CLOTHES HAD
15 DUST IN THEM LIKE THAT SHOWN ON THE VIDEO AT THE TIME THAT
16 THE FATHER GOT HOME FROM WORK. THE EVIDENCE SUGGESTS, IF
17 ANYTHING, THE CONTRARY, AS DOES COMMON SENSE.

18 ALSO, THERE WAS NO EVIDENCE THAT THE MOTHER
19 POUNDED -- WE ARE TALKING ABOUT LESLIE WHITELEY'S FATHER AND
20 MOTHER -- THERE IS NO EVIDENCE THAT LESLIE WHITELEY'S MOTHER
21 POUNDED AND BEAT CLOTHES AT HOME LIKE THAT DONE ON THE
22 VIDEO, OR THAT PLAINTIFF WAS IN THE VICINITY OF ANY SUCH
23 POUNDING AND BEATING. IN FACT, THE EVIDENCE SHOWS THAT
24 PLAINTIFF DID NOT HELP WITH THE LAUNDRY.

25 THE COURT FURTHER OBSERVES THAT THE VIDEO IS
26 PREJUDICIAL AND OMINOUS IN ITS CONSTRUCTION. FOR EXAMPLE,
27 THERE ARE MASKS AND AIR TUBES, AIR TUBES ON THE BACK OF THE
28 PERSON ON THE VIDEOTAPE AND THAT PERSON WAS WEARING A MASK,

JUDITH ANN OSSA, CSR NO. 2310

3135

1 ALL OF WHICH WOULD BE UNDULY PREJUDICIAL IN THE CASE. SO
2 THOSE BEING SOME OF THE EXAMPLES, THE COURT IS EXCLUDING
3 THIS ON 352 GROUNDS.

4 NOW, COUNSEL WANTED TO PUT ON THE RECORD SOME
5 OTHER MATTERS, AND ONE OF THEM IS A MOTION BY THE DEFENSE
6 WHICH THE COURT RECEIVED THIS MORNING, ALTHOUGH THE COURT
7 WAS ADVISED BY TELEPHONE ON SATURDAY THAT IT WAS LIKELY TO
8 BE FORTHCOMING, OR WOULD BE FORTHCOMING IS MORE ACCURATE,
9 AND THIS IS THE TOBACCO DEFENDANTS' MOTION FOR MISTRIAL, AND
10 THAT HAS BEEN FILED.

11 IN THAT CONNECTION, I PROBABLY SHOULD STATE ON
12 THE RECORD SOME OF THE DISCUSSION THAT WE HAD OFF THE
13 RECORD, AND THEN ALLOW THE DEFENSE TO ADD WHAT THEY HAVE
14 TOLD ME THEY WANT TO ADD, AND THE PLAINTIFF CAN REPLY.

15 THE COURT HAS INDICATED THAT PLAINTIFFS' COUNSEL
16 SHOULD MAKE EFFORTS TO DETERMINE WHETHER THE HEALTH OF
17 MS. LESLIE WHITELEY WOULD PERMIT A DEPOSITION TO BE TAKEN OF
18 HER SOMETIME WITHIN THE NEXT WEEK OR TWO, OR AT LEAST IN A
19 TIMELY FASHION FOR THIS TRIAL, ON THE ISSUE OF HER USE OF
20 MARIJUANA, WHICH IS THE ESSENTIAL MATTER RAISED IN THE
21 DEFENDANTS' MOTION.

22 AND MS. CHABER HAS INDICATED TO THE COURT THAT
23 SHE HAS SPOKEN WITH -- LET ME LET YOU SPEAK FOR YOURSELF ON
24 YOUR VIEWS OF THIS.

25 MS. CHABER: YES. I HAVE SPOKEN WITH THE
26 PLAINTIFF, I'VE SPOKEN WITH THE PLAINTIFFS' HUSBAND AND I
27 PERSONALLY DID NOT, BUT SOMEONE ELSE IN MY OFFICE -- I
28 BELIEVE MR. BROWN -- SPOKE WITH THE PLAINTIFF'S DOCTOR, ALL
JUDITH ANN OSSA, CSR NO. 2310

3136

1 OF WHOM INFORMED ME THAT MS. WHITELEY WAS IN EXCRUCIATING

2 PAIN, WAS UNABLE TO THINK, CONCENTRATE, SLEEP, AND HAD
3 METASTASES THAT WAS KNOWN NOW TO HAVE SPREAD TO HER LIVER,
4 THAT IT WAS EXTENSIVE AND THAT IT WAS MULTIPLE LESIONS, AND
5 THAT THE PHYSICIANS WERE CONCERNED THAT THERE WERE OTHER
6 MULTIPLE LESIONS IN OTHER PARTS OF HER BODY.

7 SHE WAS SCHEDULED FOR MONDAY AND TUESDAY, TODAY,
8 AND TOMORROW, TO UNDERGO NUMEROUS TESTS AND SCANS AND

OTHER

9 THINGS TO DETERMINE THE LEVEL AND EXTENT OF THE SPREAD OF
10 HER CANCER, AS WELL AS TO DETERMINE WHAT MEANS SHE COULD
11 UNDERGO, WHAT HER BLOOD COUNT WAS, WHAT HER PLATELET COUNT
12 WAS, WHETHER SHE WAS IMMUNE SUPPRESSED AND THEREFORE
13 SUSCEPTIBLE AND AT A HIGH DEGREE OF ILLNESS ASIDE FROM THE
14 CANCER, AND THAT THE EARLIEST WE WOULD HAVE INFORMATION
15 ABOUT WHAT HER CONDITION WAS WOULD BE WEDNESDAY, AND I
16 STRESSED EARLIEST.

17 AND BASICALLY, AS FAR AS I'M AWARE, SHE IS AT THE
18 HOSPITAL, AT THE DOCTOR'S OFFICE, WHEREVER THEY'RE DOING
19 THESE PROCEDURES BASICALLY ALL DAY TODAY AND ALL DAY
20 TOMORROW. AND SO THE EARLIEST THAT WE COULD INQUIRE AS TO
21 HER ABILITY TO UNDERGO ANY FURTHER DEPOSITION WOULD BE
22 WEDNESDAY.

23 I CAN STATE FROM MY CONVERSATIONS WITH THE
24 PLAINTIFF AND MY CONVERSATIONS WITH HER HUSBAND, THAT
25 BECAUSE OF THE PAIN THAT SHE IS UNDER AND HAS BEEN FOR THE
26 ENTIRE WEEK THAT SHE WAS HERE -- SHE WAS HERE FOR ALMOST
27 FOUR DAYS, AND WAS UNABLE TO GO ON THE WITNESS STAND OR BE
28 ABLE TO UNDERGO ANYTHING OTHER THAN THE 15 MINUTES THAT I

JUDITH ANN OSSA, CSR NO. 2310

3137

1 PUT HER ON -- ON FRIDAY, THAT SHE WAS FEELING WORSE, THAT
2 OBVIOUSLY SHE WAS EXTREMELY UPSET, IN ADDITION TO BEING IN
3 PAIN, AND THAT HER MEDICAL CARE WAS COMING BEFORE THIS
4 LAWSUIT.

5 AND HER DOCTOR INFORMED ME THAT, YOU KNOW, THEY
6 WERE HIGHLY SKEPTICAL AS TO WHETHER SHE WOULD EVER BE IN A
7 POSITION TO RESUME TESTIMONY.

8 THE COURT: FOR THE RECORD, THIS IS INFORMATION
9 YOU JUST LEARNED -- THAT THE PLAINTIFF JUST LEARNED THIS
10 WEEKEND, CORRECT, AS A RESULT OF SOME TESTS THAT WERE VERY
11 RECENTLY DONE?

12 MS. CHABER: THE TESTS WERE DONE BEFORE SHE CAME
13 HERE. BECAUSE SHE WAS HERE, HER DOCTORS DID NOT ACTUALLY
14 COMMUNICATE THE INFORMATION TO HER UNTIL SHE WENT BACK AND
15 LEFT HERE. WHEN SHE GOT HOME, SHE WAS ADVISED THAT MORNING
16 THAT INDEED THE TESTS HAD SHOWN WIDESPREAD METASTASES. SO
17 SHE JUST LEARNED ABOUT IT AFTER IN FACT SHE WAS HERE AND
18 UNABLE TO TESTIFY.

19 THE COURT: OKAY. WHEN YOU SAY "HERE," WE ARE
20 TALKING ABOUT SHE LEARNED THIS LAST FRIDAY MORNING?

21 MS. CHABER: YES.

22 THE COURT: I JUST WANT TO BE CLEAR ABOUT ONE
23 THING. THE COURT DOES NOT INTEND TO PUT ANY PRESSURE ON MS.
24 WHITELEY TO DO ANYTHING THAT IS MEDICALLY UNWISE. THE
25 SUGGESTION IS MERELY THAT YOU ASCERTAIN AT AN APPROPRIATE
26 TIME WHETHER, MEDICALLY SPEAKING, SHE IS ABLE TO GIVE A
27 DEPOSITION.

28 THE REQUEST OF THE COURT SHOULD NOT BE
JUDITH ANN OSSA, CSR NO. 2310

3138

1 INTERPRETED IN ANY WAY, SHAPE OR FORM AS PUTTING PRESSURE ON
2 ANYBODY TO DO ANYTHING THAT WOULD IMPAIR HEALTH. THE
3 QUESTION FOR YOU TO FIND OUT, MS. CHABER, AT WHATEVER TIME

4 YOU THINK IS APPROPRIATE, IS WHETHER, WITHOUT ANY RISK BEING
5 RUN TO HER HEALTH, AND IN A SITUATION WHERE SHE IS ABLE TO
6 GIVE TESTIMONY, TO FIND OUT IF THAT WOULD BE POSSIBLE.

7 THE DEFENSE LAWYERS HAVE INDICATED THAT IF
8 SOMETHING CAN BE WORKED OUT, THEY WANT TO BE PRESENT DURING
9 THE DEPOSITION, BUT THEY WILL GO TO ANYPLACE THAT IS
10 CONVENIENT FOR HER, AND THAT IT NEED NOT BE A VIDEOTAPE
11 DEPOSITION. SO WITHIN THOSE PARAMETERS, PLEASE CHECK THE
12 SITUATION OUT AT A TIME THAT YOU THINK IT'S APPROPRIATE AND
13 THEN LET US KNOW.

14 THE RECORD SHOULD ALSO REFLECT, THOUGH, THAT THE
15 DEFENDANTS HAVE ASKED THE COURT TO STRIKE THE 15 MINUTES OF
16 LIVE TESTIMONY THAT SHE DID GIVE LAST THURSDAY AFTERNOON,
17 AND THAT THERE IS -- FIRST OF ALL, THAT'S CORRECT; RIGHT?

18 MR. HARDY: YES, YOUR HONOR.

19 THE COURT: AND THERE IS NO OBJECTION BY THE
20 PLAINTIFFS' COUNSEL OR THE PLAINTIFFS TO THAT BEING DONE;
21 CORRECT?

22 MS. CHABER: NO OBJECTION.

23 THE COURT: AND IN FACT, THE PARTIES HAVE WORKED
24 OUT BY STIPULATION SOME LANGUAGE THAT IS -- AND OF COURSE,
25 THIS IS WITHOUT PREJUDICE TO DEFENDANTS' MOTION FOR
26 MISTRIAL -- BUT THE PARTIES HAVE STIPULATED TO SOME LANGUAGE
27 WHICH THE COURT IS GOING TO READ TO THE JURY WHEN WE RESUME
28 AT 1:30.

JUDITH ANN OSSA, CSR NO. 2310

3139 I WOULD JUST LIKE YOU TO CONFIRM ON THE RECORD
1 THAT WHAT I AM GOING TO READ IS THE PRODUCT OF A STIPULATION
2 THAT YOU MADE. MAY I HAVE THAT AFFIRMATION?

3 MS. CHABER: YES.

4 MR. HARDY: YES.

5 MR. FURR: YES, YOUR HONOR.

6 MR. ROSSE: YES.

7 MS. CHABER: COULD I ADD ONE THING?

8 THE COURT: YES.

9 MS. CHABER: I DID WANT TO STATE FOR THE RECORD
10 THAT I ADVISED BOTH THE COURT AND COUNSEL THAT EVEN PRIOR TO
11 MS. WHITELEY LEAVING SAN FRANCISCO TO RETURN HOME, THAT WE
12 HAD ATTEMPTED TO CONTACT HER DOCTOR AT THAT POINT IN TIME,
13 BECAUSE SHE WAS VERY MUCH IN PAIN AND VERY ILL WHEN SHE WAS
14 HERE. AND HER DOCTOR, WITHOUT DISCLOSING THE PRECISE
15 MEDICAL CONDITION, DID LET US KNOW AT THAT TIME THAT THERE
16 WAS SOMETHING OF GRAVE CONCERN AND SOMETHING, AS THE
17 DOCTOR

DOCTOR
18 PUT IT, OMINOUS.

19 AND THAT I DID ADVISE THE COURT AND COUNSEL
20 IMMEDIATELY ABOUT THAT, EVEN BEFORE WE KNEW WHAT THE FINAL
21 CIRCUMSTANCES WERE, AND THAT THE MINUTE THAT I GOT THE CT
22 SCAN REPORT FROM HER PHYSICIAN AND KNEW WHAT THE
23 CIRCUMSTANCES WERE, THAT I IMMEDIATELY PROVIDED THAT TO
24 DEFENSE COUNSEL AS WELL AS A DESIGNATION OF PLAINTIFF'S
25 VIDEOTAPE DEPOSITION FOR PERPETUATION OF TRIAL THAT HAD
26 PREVIOUSLY BEEN TAKEN OF HER.

27 THE COURT: MS. CHABER ADVISED THE COURT AND IN
28 COUNSEL'S PRESENCE ON THURSDAY, EVEN BEFORE WE BROKE FOR
THE

JUDITH ANN OSSA, CSR NO. 2310

3140 1 DAY, THAT SHE HAD BEEN ADVISED BY THE DOCTOR THAT THE
2 RESULTS WERE GOING TO BE OMINOUS AND THAT THEY WERE GOING TO
3 BE GIVEN TO THE PLAINTIFF SHORTLY.

4 ONE OTHER THING, AND THIS MAY BE A FOOTNOTE OR A

5 DETAIL. LET ME MENTION IT. THE ESSENTIAL OR AT LEAST THE
6 MAJOR POINT OF THE MOTION FOR MISTRAL IS A CONCERN THAT THE
7 DEFENDANTS ARE EXPRESSING ABOUT THEIR OPPORTUNITY TO
8 CROSS-EXAMINE MS. LESLIE WHITELEY CONCERNING HER MARIJUANA
9 USAGE.

10 AND THE COURT INDICATED TO COUNSEL OFF THE RECORD
11 A FEW MINUTES AGO THAT IF THERE IS ANY MATERIAL IN THAT
12 DEPOSITION IN WHICH SHE TESTIFIED ABOUT HER DRUG USAGE THAT
13 THE DEFENSE WANTS TO HAVE STRICKEN, THAT I WOULD BE
14 FAVORABLY INCLINED TO DO THAT, BUT I WAS ASKING COUNSEL TO
15 SEE IF THEY COULD WORK THAT OUT ON THEIR OWN.

16 MS. CHABER: IT WAS STRICKEN.

17 MR. ESCHER: WE WORKED IT OUT, YOUR HONOR.

18 THE COURT: THAT WAS WORKED OUT. THAT HAS BEEN
19 ELIMINATED.

20 I MIGHT MENTION THAT I'VE ASKED THE PLAINTIFFS'
21 COUNSEL NOT ONLY TO LOOK INTO THE ISSUE OF WHETHER MS.
22 WHITELEY COULD GIVE A DEPOSITION WITHOUT ANY THREAT OR RISK
23 TO HER HEALTH, BUT ALSO TO RESPOND TO THE MOTION IN
24 WRITING.

25 MS. CHABER: WHICH I RECEIVED THIS MORNING, YES.

26 THE COURT: YOU HAVEN'T HAD A CHANCE TO
27 RESPOND. AND THAT THE COURT'S INCLINATION IS TO GO ON WITH
28 THE TRIAL UNTIL MS. CHABER HAS A CHANCE TO BOTH RESPOND IN
JUDITH ANN OSSA, CSR NO. 2310

3141 WRITING TO THE MOTION AND ALSO TO DETERMINE WHETHER OR NOT
1 THIS DEPOSITION CAN BE FORTHCOMING.

3 I WOULD ASK YOU ALL TO ALSO BRIEF AN ISSUE THAT
4 IS RAISED IN THE DEFENSE'S MOTION, AND THAT IS A SUGGESTION
5 THAT THE COURT COULD STRIKE THE TESTIMONY OF THE EXPERT
6 WITNESSES FOR THE PLAINTIFFS TO THE EXTENT THAT THAT
7 TESTIMONY PURPORTS TO DESCRIBE OR TO OPINE ABOUT DRUG USAGE
8 ON PLAINTIFF'S PART WHICH IS BASED ON PLAINTIFF'S
9 INTERROGATORY ANSWERS OR WHAT PLAINTIFF TOLD THESE EXPERTS
10 ON THE GROUND THAT THERE WON'T BE ANY ADMISSIBLE EVIDENCE TO
11 SUPPORT THOSE OPINIONS OR THOSE DESCRIPTIONS, AND WHETHER
12 THERE WILL BE OR NOT MAY WELL DEPEND ON THE AVAILABILITY OF
13 MS. WHITELEY FOR A DEPOSITION. BUT AGAINST THE POSSIBILITY
14 THAT SHE CAN'T GIVE THE DEPOSITION, I WOULD ASK THE PARTIES
15 TO BRIEF THE QUESTION OF WHETHER THAT WOULD NOT BE AN
16 ADEQUATE AMELIORATIVE METHOD OF HANDLING THE SITUATION THAT
17 WE HAVE HERE.

18 AND IF SO, I WOULD ASK BOTH PARTIES, INCLUDING
19 THE DEFENSE, TO DESCRIBE WHAT IT IS THAT SHOULD BE STRICKEN
20 IN THAT RESPECT WITH SOME PARTICULARITY, SO THAT THE COURT
21 WILL UNDERSTAND WHAT IT IS THAT IT IS BEING ASKED TO
22 STRIKE.

23 IN ASKING THE DEFENSE TO DO THAT, IT'S UNDERSTOOD
24 THAT I'M NOT ASKING YOU TO WAIVE YOUR FUNDAMENTAL POINT,
25 WHICH IS THAT THERE OUGHT TO BE A MISTRAL, BUT I'M ASKING
26 YOU TO ADDRESS THE ISSUE IN THE CONTEXT OF THE POSSIBILITY
27 THAT THE COURT WILL NOT GRANT A MISTRAL BUT WILL BE
28 ADDRESSING THE QUESTION OF POSSIBLE AMELIORATIVE EFFORTS.

JUDITH ANN OSSA, CSR NO. 2310

3142
1 MS. CHABER: YES. I HAD A QUESTION IN THAT
2 REGARD. AND IT SEEMS TO ME THAT THERE ARE CERTAIN FACTUAL
3 PREDICATES -- AND WITHOUT HAVING READ THE DEFENDANTS'
4 PAPERS, MAYBE THEY ARE ADDRESSED IN THERE -- BUT IT SEEMS TO
5 ME THAT THERE HAVE TO BE SOME FACTUAL PREDICATES THAT THERE
6 WOULD BE SOMETHING DEVELOPED FROM THIS CROSS-EXAMINATION IN
7 ORDER FOR THERE TO BE ANY PREJUDICE FROM BEING SO-CALLED

8 DEPRIVED, WHICH I DON'T BELIEVE THAT THEY ARE, BASED ON
9 OTHER THINGS.

10 BUT WITHOUT ARGUING THE MERITS OF IT, THAT IT
11 SEEMS TO ME THAT THERE SHOULD BE SOME FACTUAL PREDICATE TO
12 THAT, BECAUSE IF THERE'S NO FACTUAL PREDICATE, THEN THERE'S
13 A LOT OF ARGUMENT ABOUT THEIR LACK OF CROSS-EXAMINATION,
14 BECAUSE THEY HAVE SO-CALLED EXTRINSIC EVIDENCE THAT IT SEEMS
15 TO ME THAT THERE CAN BE WAYS FOR THE DEFENDANTS TO SET
16 FORTH, WITHOUT TOTALLY DISCLOSING WHAT THE EXTRINSIC
17 EVIDENCE IS, TO BE SURE THAT THIS IS SOMETHING THAT IS TRULY
18 PREJUDICIAL.

19 THE COURT: LET ME REACT TO THAT THIS WAY. WHEN
20 I CONSIDER THE MOTION FOR MISTRIAL, I'LL CONSIDER IT BASED
21 ON THE RECORD THAT I HAVE. IF THE DEFENSE BELIEVES THAT FOR
22 STRATEGIC REASONS THEY DON'T WANT TO DISCLOSE SOMETHING OR
23 ONLY PARTIALLY DISCLOSE IT, I'M GOING TO BASE MY RULING ON
24 THE RECORD AS I HAVE IT. AND SO IT'S REALLY GOING TO BE
25 THEIR CHOICE AS TO WHAT SHOWING TO MAKE, AS IT WILL BE YOUR
26 CHOICE AS TO WHAT RESPONSE TO MAKE.

27 ONE THING YOU MAY WANT TO TALK TO THE DEFENSE
28 LAWYERS ABOUT OFF THE RECORD IS THE NEED FOR YOU TO MAKE A
JUDITH ANN OSSA, CSR NO. 2310

3143 1 RECORD WITH RESPECT TO HER FINANCIAL -- EXCUSE ME -- HER
2 MEDICAL SITUATION, WHETHER THERE CAN BE SOME STIPULATION TO
3 OBLIGATE THE NEED FOR GETTING THE DOCTORS INVOLVED IN THIS.
4 I THINK YOU NEED TO TAKE THAT UP WITH THEM. BUT OBVIOUSLY,
5 THE PREDICATE, FROM YOUR POINT OF VIEW, IS HER MEDICAL
6 CONDITION, AND I DON'T HAVE ANY EVIDENCE OF THAT, ABSENT A
7 STIPULATION OR SOME KIND OF DECLARATION. SO YOU MIGHT TALK
8 TO EACH OTHER ABOUT THAT AS WELL.

9 I THINK THAT MR. HARDY HAS BEEN PATIENTLY WAITING
10 TO SAY SOMETHING ABOUT THE DEFENSE'S POSITION ON THIS.

11 MR. HARDY: WELL, TWO THINGS, REALLY. THANK
12 YOU, YOUR HONOR. I WANTED JUST TO MENTION -- I THINK IT'S
13 SET FORTH CLEARLY IN OUR BRIEF, AND I WON'T ARGUE FROM THE
14 BRIEF -- BUT THE MOTION FOR MISTRIAL IS A NONCONTINGENT
15 MOTION FROM THE STANDPOINT OF PHILIP MORRIS; THAT IS, IT IS
16 OUR POSITION THAT IT WAS THE APPEARANCE OF SUBSTANTIVE
17 TESTIMONY OF MRS. WHITELEY LAST THURSDAY AND HER SUBSEQUENT
18 UNAVAILABILITY WHICH CREATES AN INCURABLE PREJUDICE.

19 IT IS MY UNDERSTANDING THAT THE COURT, IN TAKING
20 THIS UNDER ADVISEMENT, CONSIDERS THAT OUR POSSIBLE ABILITY
21 TO TAKE A FUTURE DEPOSITION ON LIMITED AREAS WOULD BE
22 RELEVANT TO THE COURT'S CONSIDERATION ABOUT THE MERITS OF
23 OUR EXISTING MOTION.

24 THE COURT: AND IN ADDITION TO THAT, I MIGHT
25 ADD, THE POSSIBILITY OF STRIKING TESTIMONY WOULD BE ANOTHER
26 POSSIBILITY.

27 MR. HARDY: YES. THAT'S UNDERSTOOD. I SIMPLY
28 WANTED TO BE SURE THAT WE DIDN'T WAIVE ANY OBJECTION TO THE
JUDITH ANN OSSA, CSR NO. 2310

3144 1 PARTICULAR PROCEDURE THAT'S BEING FOLLOWED NOW IN THE
2 CONDUCT OF THE TRIAL, WHILE THE MOTION FOR MISTRIAL
3 CONTINUES TO BE PENDING; THAT IS, THE PRESENT PROCEDURE
4 CALLS FOR THE PLAINTIFF'S VIDEO DEPOSITION, PORTIONS OF LAST
5 SEPTEMBER, AS DESIGNATED BY THE PARTIES, IS TO BE PLAYED TO
6 THE JURY.

7 AND IN THE EVENT THAT THE MOTION FOR MISTRIAL IS
8 DENIED AND THAT DEFENDANTS ARE AFFORDED AN OPPORTUNITY TO
9 DEPOSE MRS. WHITELEY FURTHER AND DO SO, THAT IT WOULD THEN
10 BE A CIRCUMSTANCE WHERE THEY WOULD OFFER THAT FUTURE

11 TESTIMONY TO THE JURY AT SOME LATER POINT IN THE TRIAL,
12 DURING THE PRESENTATION OF DEFENDANTS' CASE.

13 IT'S OUR POSITION, HOWEVER, THAT THAT ALSO
14 CREATES A SITUATION OF PREJUDICE BY SPLITTING UP THE
15 TESTIMONY OF THE PLAINTIFF LESLIE WHITELEY BETWEEN VIDEO
16 DEPOSITION TESTIMONY, DIRECT AND CROSS NOW, AND THEN LATER
17 IN THE CASE THE PRESENTATION OF WHATEVER LIMITED DEPOSITION
18 TESTIMONY WE MAY IN THE FUTURE SECURE.

19 THE COURT: LET ME JUST INTERRUPT FOR ONE
20 SECOND. WOULD YOU PREFER IT IF THE DEFENSE WERE ALLOWED TO
21 START PUTTING ON ITS DEFENSE NOW AND THAT THE VIDEO WAS
22 PLAYED AT A LATER TIME, PERHAPS TOGETHER WITH ANY SUBSEQUENT
23 DEPOSITION TESTIMONY THAT WE HAVE? OR GIVEN THAT AS AN
24 OPTION, OR PLAYING THE EXISTING VIDEO AS THE OTHER OPTION,
25 WHICH OF THOSE WOULD YOU CHOOSE?

26 MR. HARDY: WELL, AS BETWEEN THOSE TWO OPTIONS,
27 I THINK WE WOULD CHOOSE TO HAVE THE VIDEO AS IT EXISTS NOW
28 PLAYED, AND ANY PORTION THAT WE MIGHT SECURE LATER PLAYED AT
JUDITH ANN OSSA, CSR NO. 2310

3145 THAT TIME.

1 IT IS THE THIRD OPTION WHICH WE PREFER,
2 HOWEVER -- AND THAT IS THE BASIS FOR MY OBJECTION FOR THE
3 RECORD -- IS SIMPLY THAT WE BELIEVE THAT IF THE TRIAL IS
4 GOING TO GO FORWARD, THAT THE APPROPRIATE PROCEDURE WOULD
5 THEN BE TO STOP THE TRIAL UNTIL ALL OF THE TESTIMONY OF
6 MRS. WHITELEY CAN BE GIVEN AT ONE TIME, WHICH WOULD CONSIST
7 OF LAST SEPTEMBER'S DEPOSITION AS EDITED AND WHATEVER WE'RE
8 ABLE TO SECURE IN A FURTHER DEPOSITION IN SOUTHERN
9 CALIFORNIA.

10 MS. CHABER: WELL, I THINK THAT, FIRST OF ALL,
11 THE DEFENSE AT ANY TIME IN THEIR CASE CAN ALWAYS PLAY A
12 PLAINTIFF'S DEPOSITION TESTIMONY. SO I DON'T THINK THIS IS
13 ANYTHING DIFFERENT THAN ANY OTHER CASE WHERE THEY CHOOSE TO
14 PUT CERTAIN PARTS ON IN THE PLAINTIFF'S CASE AND THEN PUT ON
15 WHAT THEY CHOOSE.

16 SINCE THIS IS THEIR DEFENSE, IT DOESN'T SEEM TO
17 ME TO BE PARTICULARLY PREJUDICIAL FOR THEM TO HAVE HAD EIGHT
18 HOURS OF CROSS-EXAMINATION IN SEPTEMBER AND THEN TO BE
19 ALLOWED TO PLAY THIS OTHER PORTION DURING THEIR CASE,
20 PARTICULARLY GIVEN THAT THEY CAN ALSO PROVE THESE SAME
21 THINGS, WHATEVER THEY ARE, BY EXTRINSIC EVIDENCE AS WELL,
22 AND THAT WOULD BE COMING IN THEIR CASE, NOT IN THE
23 PLAINTIFFS' CASE.

24 THE COURT: YOU MEAN THE EXTRINSIC EVIDENCE
25 ABOUT THE MARIJUANA USE?

26 MS. CHABER: ABOUT THE MARIJUANA USAGE. AND
27 ALSO, I WOULD POINT OUT THAT IN TERMS OF TIME FRAMES, WE
JUDITH ANN OSSA, CSR NO. 2310

3146 HAVE, NO. 1, NO GUARANTEE THAT THE PLAINTIFF IS EVER GOING
2 TO BE ABLE TO SIT; TWO, IT COULD BE A WEEK FROM NOW, IT
3 COULD BE TWO WEEKS FROM NOW.

4 EVEN IF IT WAS THURSDAY, IF SOMEHOW SHE WAS ABLE,
5 WE WERE ABLE AND EVERYONE WAS ABLE TO PUT IT TOGETHER TO DO
6 THEN, I THINK THAT THE COURT IS ALWAYS IN A POSITION TO
7 REQUIRE THE ORDER OF PROOF TO BE IN A PARTICULAR FASHION,
8 AND IN FACT HAS TO THIS POINT NOT ALLOWED ME TO BREAK UP THE
9 TESTIMONY OF CERTAIN WITNESSES AND SO FORTH.

10 SO I DON'T THINK THERE'S ANY PREJUDICE TO DOING
11 IT THIS WAY.

12 THE COURT: ALL RIGHT. SUBMIT IT?

13 MS. CHABER: SUBMIT IT.

14 THE COURT: SUBMIT IT?
15 MR. HARDY: SUBMIT IT.
16 THE COURT: I THINK ON THAT MATTER, THAT THE
17 COURT AGREES WITH MS. CHABER, THAT THERE IS NO SUBSTANTIAL
18 PREJUDICE. INDEED, I DON'T THINK THERE IS ANY PREJUDICE AT
19 ALL FROM PROCEEDING WITH THE VIDEOTAPE BEING SHOWN NOW,
20 PARTICULARLY SINCE THAT'S DEFENDANTS' CHOICE OVER THE
21 ALTERNATIVE. AND IT IS TRUE WE DON'T KNOW WHEN, IF EVER,
22 WE'LL BE ABLE TO GET ANY FURTHER TESTIMONY FROM MS. LESLIE
23 WHITELEY.

24 AND THE COURT JUST CAN'T DO THAT TO THE JURY, TO
25 SEND THEM HOME FOR AN INDEFINITE PERIOD OF TIME. THE JURY
26 AND ALL THE PARTIES HAVE AN INVESTMENT IN THIS CASE OF
27 SEVERAL WEEKS' WORTH OF TIME.

28 AND IT SEEMS TO THE COURT THAT THE FAIREST TO ALL
JUDITH ANN OSSA, CSR NO. 2310

3147 1 THE PARTIES AND THE MOST EFFICIENT WAY AND THE FAIREST TO
2 THE JURY AS WELL IS TO PROCEED FORWARD WITH THE CASE. AND
3 WE'LL MEET THE CIRCUMSTANCES OF THE NEXT FEW DAYS AS THEY
4 ARISE AND DO THE BEST WE CAN DO IN DEALING WITH THAT.

5 IS THERE ANYTHING ELSE THAT ANYBODY WANTS TO PUT
6 ON THE RECORD BEFORE WE GO TO LUNCH?

7 MR. ROSSE: I JUST WANT TO --

8 MS. CHABER: OTHER THAN THE FACT THAT IT'S 1:00
9 O'CLOCK? I'D LIKE TO PUT THAT ON THE RECORD.

10 THE COURT: I THINK YOU JUST DID.

11 MR. ROSSE: I JUST WANT TO MAKE CLEAR THAT
12 METALCLAD IS JOINING IN THE MOTION FOR MISTRIAL.

13 THE COURT: THAT'S FINE. THE COURT IS GOING TO
14 DEFER RULING ON THAT ACCORDING TO WHAT'S BEEN STATED ON THIS
15 RECORD. HAVE A GOOD LUNCH.

16 (LUNCH RECESS TAKEN AT 1:00 P.M.)

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JUDITH ANN OSSA, CSR NO. 2310

3148 1 AFTERNOON SESSION 1:40 P.M.
2 MONDAY, FEBRUARY 14, 2000

3 THE COURT: GOOD AFTERNOON, EVERYBODY.

4 JURORS, IT WILL NOT BE POSSIBLE FOR THE
5 PLAINTIFFS TO CONTINUE AND COMPLETE THE TESTIMONY OF LESLIE
6 WHITELEY FROM THE WITNESS STAND. THIS IS NOT DUE TO THE
7 FAULT OF ANYONE, NOT LESLIE WHITELEY, NOT HER ATTORNEYS, AND
8 NOT THE ATTORNEYS FOR THE DEFENDANTS. IT IS SIMPLY AN
9 UNAVOIDABLE CIRCUMSTANCE WITH WHICH WE MUST ALL WORK.

10 BECAUSE LESLIE WHITELEY'S COURTROOM TESTIMONY
11 LAST THURSDAY WAS INCOMPLETE, WITH DEFENSE COUNSEL HAVING NO
12 OPPORTUNITY TO CROSS-EXAMINE HER, I AM GOING TO STRIKE IT
13 FROM THE RECORD AND INSTRUCT YOU TO DISREGARD THAT
14 TESTIMONY. IT IS NOT EVIDENCE IN THIS CASE AND YOU SHOULD
15 CROSS OUT ANY NOTES YOU MAY HAVE MADE DURING THAT
16 TESTIMONY.

17 LET ME GIVE YOU A MINUTE TO DO THAT.

18 NOW, LAST SEPTEMBER, LESLIE WHITELEY GAVE A VIDEO
19 DEPOSITION FOR USE AT TRIAL, DURING WHICH DEPOSITION SHE
20 ANSWERED QUESTIONS POSED BY HER COUNSEL AND BY DEFENSE
21 COUNSEL. PLAINTIFFS WILL NOW PLAY A PORTION, AFTER WHICH
22 DEFENDANTS WILL PLAY A PORTION OF THE SAME DEPOSITION, AND
23 ALL OF THAT WILL BE TESTIMONY IN THIS CASE.

24 FOR SCHEDULING, I BELIEVE THAT THE TAPE THAT THE
25 PLAINTIFFS ARE GOING TO PLAY PROBABLY HAS ABOUT TWO HOURS OF
26 RUNNING TIME TO IT. SO I THINK WHAT WE'RE GOING TO DO IS
27 TAKE A RECESS SOMEWHERE APPROXIMATELY HALFWAY INTO THAT
28 TAPE. AND MS. CHABER, SINCE YOU'RE SHOWING IT, YOU CAN CALL

JUDITH ANN OSSA, CSR NO. 2310

3149 THE TIME FOR US AS TO WHEN WE HAVE A LOGICAL BREAK.

1 AND THEN THAT'S GOING TO TAKE US TILL SOMETIME I
2 THINK PAST 4:00 O'CLOCK TODAY. SO I'M GOING TO RECESS FOR
3 THE DAY AT THAT POINT.

4 AND THE DEFENSE, THE FIRST THING TOMORROW
5 MORNING, WILL PLAY THE SEGMENT OF THE VIDEO OR THE VIDEO
6 THAT THEY HAVE FROM THE SAME DEPOSITION, AND WE'LL JUST DO
7 THAT AT ONE TIME FIRST THING TOMORROW MORNING. THAT MAY
8 TAKE AN HOUR OR TWO AS WELL. BUT WHATEVER IT TAKES, UPON
9 THE COMPLETION OF THAT VIDEO, THEN THE PLAINTIFFS WILL BE
10 RESTING THEIR CASE IN CHIEF AND THE DEFENSE WILL START WITH
11 THE PRESENTATION OF THEIR DEFENSE TOMORROW MORNING. SO
12 THAT'S WHAT THE SCHEDULE IS.

13 SO FOR TODAY, WE'RE GOING TO PLAY THE PORTIONS OF
14 THE VIDEOTAPE DEPOSITION THAT THE PLAINTIFFS ARE OFFERING.
15 AND SO I THINK WE ARE GOING TO HAVE THE SAME STIPULATION
16 THAT WE HAD BEFORE, THAT TOMORROW MORNING YOU'RE GOING TO
17 GIVE ME A MARKED COPY OF THE VIDEO OF ALL PORTIONS THAT BOTH
18 SIDES ARE SHOWING AND WE'LL MARK THAT TOMORROW.

19 MS. CHABER: CORRECT.

20 THE COURT: FOR TODAY, WE CAN I THINK IN A
21 MINUTE GO OFF THE RECORD AND PLAY THIS VIDEO.

22 MS. CHABER: DOES THE COURT WANT TO MARK THE
23 TAPE? BECAUSE I ACTUALLY HADN'T PUT IT IN YET.

24 THE COURT: THIS IS THE PORTION OF THE VIDEO
25 THAT THE PLAINTIFFS ARE OFFERING INTO EVIDENCE; RIGHT?
ISN'T THAT RIGHT?

26 MS. CHABER: YES.

JUDITH ANN OSSA, CSR NO. 2310

3150 THE CLERK: PLAINTIFFS' EXHIBIT 1928.

(ITEM MORE PARTICULARLY
LISTED IN THE INDEX MARKED
FOR IDENTIFICATION PLAINTIFFS'
EXHIBIT # 1928)

6 THE COURT: AND THEN TOMORROW MORNING, WHY DON'T
7 WE JUST DEEM THIS TO BE DONE, AND WE DON'T NEED TO TAKE THE
8 TIME TO DO IT. WE'LL HAVE MARKED AS 1928-A THE PORTIONS OF
9 THE VIDEOTAPE THAT THE DEFENSE WISHES TO PRESENT, AND WE'LL
10 MARK AS PLAINTIFFS -- SHALL WE JUST MARK IT AS PLAINTIFFS'
11 EXHIBIT 1929, WHICH IS THE HARD COPY OF THE DEPOSITION THAT
12 SHOWS THE SEGMENTS THAT BOTH PARTIES ARE PLAYING?

13 MR. ESCHER: YES, YOUR HONOR.

14 MS. CHABER: YES, YOUR HONOR.

15 THE COURT: THAT WILL BE PLAINTIFFS' 1929. I
16 WILL LEAVE THAT UP TO COUNSEL TO GET THAT INTO TATSUO'S
17 HANDS.

18 1928 FOR IDENTIFICATION IS THE PORTION OF THE
19 VIDEO THAT THE PLAINTIFFS ARE SHOWING.

20 1928-A ARE THE PORTIONS OF THE VIDEO THAT THE
21 DEFENSE IS SHOWING.

22 (ITEM MORE PARTICULARLY
23 LISTED IN THE INDEX MARKED
24 FOR IDENTIFICATION PLAINTIFFS'
25 EXHIBIT # 1928-A)

26 THE COURT: 1929 IS THE WRITTEN VERSION OF
27 WHAT'S BEING SHOWN.

28 (DOCUMENT MORE PARTICULARLY
 JUDITH ANN OSSA, CSR NO. 2310

3151 1 LISTED IN THE INDEX MARKED
2 FOR IDENTIFICATION PLAINTIFFS'
3 EXHIBIT # 1929)

4 THE COURT: ALL RIGHT. I THINK THERE'S NO MORE
5 TO BE DONE ON THE RECORD AND THAT WE CAN GO OFF THE RECORD
6 AT THIS TIME FOR THE PLAYING. WE CAN GO OFF THE RECORD.

7 MS. CHABER: THE ONLY THING I WAS GOING TO ASK
8 IS SINCE NO ONE IS USING THE PODIUM, WHETHER THIS NEEDS TO
9 BE MOVED FOR THE JURORS' BENEFIT?

10 THE COURT: IS THE PODIUM IN ANYBODY'S WAY?
11 OKAY. WHEN WE START PLAYING THE VIDEO, IF IT TURNS OUT TO
12 BE IN SOMEONE'S WAY, SPEAK UP AND WE'LL STOP THE VIDEO.
13 OKAY.

14 MS. CHABER: THANK YOU. I NEED SOMEBODY TO GET
15 THE LIGHTS.

16 (VIDEOTAPE SHOWN)

17 THE COURT: DO YOU WANT TO TAKE OUR AFTERNOON
18 RECESS AT THIS POINT? I WAS JUST GOING TO TAKE ONE BREAK
19 THIS AFTERNOON. LET'S TAKE IT RIGHT NOW. LET'S TAKE A
20 20-MINUTE RECESS UNTIL QUARTER TO 3:00, AND THEN WE'LL
21 COMPLETE THE PLAYING OF THE VIDEO TO THE END OF THE
22 AFTERNOON.

23 WE'LL SEE YOU BACK AT QUARTER TO 3:00. PLEASE
24 CONTINUE TO FOLLOW THE ADMONITION.

25 (RECESS TAKEN FROM 2:25 TO 2:45 P.M.)

26 THE COURT: WE ARE BACK ON THE RECORD. LET ME
27 JUST SAY FOR THE JURY'S BENEFIT -- I THINK IT ACTUALLY SHOWS
28 ON THE VIDEO -- BUT THE DATES OF THESE VIDEOTAPE DEPOSITIONS
 JUDITH ANN OSSA, CSR NO. 2310

3152 1 WERE SEPTEMBER 14, 15 AND 16 OF 1999.

2 MS. CHABER: YES.

3 THE COURT: OKAY. THEN I THINK WE ARE READY TO
4 GO OFF THE RECORD FOR THE COMPLETION OF THE PLAYING OF THE
5 SEGMENT OF THE VIDEO THAT'S BEING OFFERED BY THE
6 PLAINTIFFS. WE CAN GO OFF THE RECORD.

7 MS. CHABER: THANK YOU.

8 (VIDEOTAPE SHOWN)

9 THE COURT: WE ARE BACK ON THE RECORD.
10 JURORS, LET ME SAY I'M GOING TO LET YOU GO FOR
11 THE DAY.

12 NOW, I WANT TO BE FAITHFUL TO THE TIME ESTIMATE
13 THAT I GAVE YOU AT THE OUTSET OF THIS CASE. AND WE HAVE
14 LOST SOME TIME. AND AS I'VE TOLD YOU, THE LAWYERS ARE GOING
15 TO DO THEIR BEST TO MAKE UP THAT TIME. BUT I'M GOING TO
16 HAVE TO START GETTING IN SOME LONG DAYS IN THE NEXT FEW
17 DAYS.

18 SO I AM GOING TO NEED YOU HERE TOMORROW AT 9:00
19 O'CLOCK. AND I AM GOING TO ASK YOU TO PLAN FOR A FULL DAY
20 TOMORROW TILL 5:00 O'CLOCK. SO I VERY MUCH APPRECIATE AND
21 ANTICIPATE YOUR COOPERATION IN THE MATTER.

22 I'M SORRY ABOUT THE DELAYS THAT WE HAVE HAD, BUT

23 THEY HAVE ALL BEEN CIRCUMSTANCES BEYOND ANYBODY'S CONTROL.
24 WE ARE DOING OUR BEST TO KEEP YOUR CONVENIENCE AS A TOP
25 PRIORITY.

26 SO OVER THE COURSE OF THE EVENING, PLEASE
27 CONTINUE TO FOLLOW THE ADMONITION. HAVE A GOOD EVENING.
28 AND I DO ASK YOU TO PLEASE BE HERE AT 9:00 O'CLOCK SHARP.

JUDITH ANN OSSA, CSR NO. 2310

3153

1 I DON'T HAVE ANYTHING ELSE TOMORROW PRIOR TO THIS
2 TRIAL. WE ARE GOING TO START AT 9:00 O'CLOCK SHARP AND GO
3 ALL DAY. SO SEE YOU TOMORROW.

4 (THE PROCEEDINGS ADJOURNED AT 4:00 P.M.)

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JUDITH ANN OSSA, CSR NO. 2310